Supreme Court, U. S.
FILED
OCT 21 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-662

JAMES R. SCHLESINGER, ET AL., PETITIONER

v.

BRUCE R. COUNCILMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT ON THE MERITS

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STATEMENT

Respondent concurs with the statements set out in Petitioner's Brief on the Merits under the headings *OPINIONS BELOW* and *JURISDICTION*. At the request of this Court, Respondent has previously filed a Brief on the Jurisdictional Issues which we request be incorporated in our Brief on the Merits.

Respondent, Councilman, a Captain in the United States Army, stationed at Fort Sill, Oklahoma was charged under the Uniform Code of Military Justice with the wrongful sale and transfer of marijuana to an enlisted man, Army Specialist 4 Glen D. Skaggs. He also was charged with the wrongful possession of marijuana which took place on another occasion. 1/

1/ The first charge was a wrongful sale of marijuana to Specialist 4 Glen D. Skaggs in Lawton, Oklahoma, on March 15, 1972; at 10:30 p.m., of .208 ounces of marijuana. The second charge was the transfer of marijuana to Specialist 4 Glen D. Skaggs in Lawton, Oklahoma on March 15, 1972, at 1:15 a.m. of two marijuana cigarettes. The third charge was wrongful possession of marijuana at Councilman's apartment in Lawton, Oklahoma, on March 18, 1972, of 1.410 ounces of marijuana.

Captain Councilman sought to have the Court-Martial proceedings dismissed for lack of jurisdiction, but his motion was denied by the presiding Judge of the Court-Martial and this suit was commenced.

The facts involved here which are not in dispute are as follows: United States Army authorities were advised by a confidential informant that Captain Councilman was using marijuana in his off-post apartment in Lawton, Oklahoma. Thereafter, at a party to which Captain Councilman was invited for that purpose, he was introduced to an undercover agent of the Army's Criminal Investigation Division, Specialist 4 Glen D. Skaggs. Skaggs, at the time, was using the name Danny Drees and was introduced to Councilman as an Army Clerk Typist, also stationed at Fort Sill. Thereafter, it is alleged that Councilman on one occasion transferred and on another, sold small amounts of marijuana to Skaggs, alias Drees. Based on Skaggs' investigation, Councilman was apprehended by civilian authorities and a search of his apartment turned up a small quantity of marijuana. Skaggs, from time to time, also acted on behalf of the civilian authorities. Councilman was subsequently turned over to the Military authorities and the Court-Martial proceedings here in issue were commenced. During all times relevent to the issues in this case, it has been stipulated that Councilman was off-post, off-duty, and out of uniform and that Skaggs was off-post and out of uniform, and although ostensibly off-duty, he was in fact, on duty in his capacity as an undercover agent.

QUESTION PRESENTED

The question presented is whether a Court-Martial has jurisdiction to try a member of the Armed Forces, who is charged with the commission of a crime cognizable in a Civilian Court and having as its only Military significance, the involvement of an undercover CID Agent, where the offense was alleged to have been

committed off-post, during off-duty hours and while out of uniform, thus depriving a service man of his Constitutional Rights to indictment by Grand Jury and a trial by a jury of his peers in a Civilian Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case now before the Court, as did O'Callahan v. Parker 395 US 258, 23 L. Ed. 2nd 291 89 S. Ct. 1683 and Relford v. Commandant 401 US 355 28 L. Ed. 2nd 102 91 S. Ct. 649, falls within the area of stress between the Guarantees contained in Article III, Section 2, Cl. 3 of the Constitution, in the Fifth and Sixth Amendments on the one hand, and on the other, the power vested in Congress in Article I, Section 8, Cl. 14, of the Constitution "to make rules for the Government and Regulation of the Land and Naval Forces", with its supportive necessary and proper provisions in Clause 18, and the Fifth Amendment's correlative exception for "cases arising in the Land or Naval Forces".

The Brief of Petitioners on the Merits argues that the offenses of sale and transfer of marijuana by an Army Officer to an Army enlisted man and the possession of marijuana by an Officer are "service connected" and thus, within Military Court-Martial jurisdiction, even though the alleged offenses occurred off-post, off-duty, out of uniform and while the "enlisted man" involved was in fact an undercover agent. The apparent reason for the position of the Petitioner is the status of the Officer and the enlisted man.

We would assert that the requirement of indictment by a Grand Jury and a right to a jury trial are not forfeited by a person, simply because he chooses, or is in some cases, required to serve his Country as a member of the Armed Forces. We would agree with Petitioner that these rights, at some point, must give way to the need of the Military to maintain discipline so it can carry

out its function—that of fighting, or being ready to fight wars. We would assert, however, that in the instant case there is no Military connection other than the fact that Councilman and the undercover Agent, Skaggs, were both members of the Military. The offenses alleged here effect the function of the Military and discipline no more than the commission of any other crime by any service man, i. e., Public drunk, DWI, Robbery, Murder, etc.

This Court has set forth criteria for determining whether the requisite "service connection" exists to deny a service man his Constitutional rights to a trial by a jury of his peers, indictment by a Grand Jury and the attendant safeguards accorded to individuals in trials by Article III Courts. The Courts below have applied these criteria as enumerated in O'Callahan and Relford and properly have resolved the question here in favor of individual liberties and against the expansion of Military authority beyond its proper domain. We would urge this Court to affirm the decision below.

ARGUMENT

Proposition: The Offenses Alleged Here Are Outside The Scope Of "Service Connection" As Previously Defined By This Court.

In order for a Military Tribunal to obtain jurisdiction to try a service man, the offense charged must be "service connected". O'Callahan, Supra. In the O'Callahan case, the Petitioner, then a Sergeant in the United States Army, was charged with attempted rape, housebreaking and assault with intent to rape, in violation of Articles 80, 130 and 134 of the Uniform Code of Military Justice. He was tried by Court-Martial, convicted on all counts and given a sentence of ten years in prison at hard labor, forfeiture of all pay and allowances and a dishonorable discharge. The offense occurred in Hawaii while the Petitioner was on an evening pass, and the victim of the

crime was a member of the civilian community. The Supreme Court granted certiorari to answer the question:

> "Does a court-martial, held under the Articles of War, Tit 10, USC Sec. 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a Grand Jury and trial by a petit jury in a civilian court?" 393 US 822, 21 L Ed 2d 93, 89 S Ct 177.

Mr. Justice Douglas in delivering the opinion of the Court stressed the importance of the distinction between the language in the Fifth Amendment, which specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and from the right to a trial by jury, and the language in the Sixth Amendment and in Art. III, Sec. 2, of the United States Constitution, which accord the accused the benefit of an indictment by a grand jury and a trial by a jury of his peers in a civilian court if the case does not arise "in the land or naval forces."

Those civil rights are the constitutional stakes in the present case, just as they were in the O'Callahan case.

The Supreme Court stated a number of reasons why the Fifth Amendment language which exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and from the right to trial by jury should be construed narrowly.

FIRST:

> "A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote."

SECOND:

"The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer."

THIRD:

"Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."

FOURTH:

"A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."

FIFTH:

"That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."

SIXTH:

"While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. Article 134, already quoted,

punishes as a crime 'all disorders and neglects to the prejudice of good order and discipline in the armed forces.' Does this satisfy the standards of vagueness as developed by the civil courts? It is not enough to say that a court-martial may be reversed on appeal. One of the benefits of a civilian trial is that the trap of Article 134 may be avoided by a declaratory judgment proceeding or otherwise."

AND AS IF IN SUMMARY:

A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."

In the O'Callahan case, the Supreme Court held that the court-martial had no jurisdiction to try the Petitioner for the particular offense. The court stressed that the Petitioner was properly absent from his military base when he committed the crimes with which he was charged. There was no connection — not even the remotest one — between his military duties and the crimes in question. The crimes were not committed on a military post; nor was the person whom he attacked performing any duties relating to the military. Moreover, the situs of the crime, Hawaii, was not an armed camp under military control. The offense occurred during peacetime. The civil courts were open. The offense was committed within the United States Territorial Limits. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.

In the present fact situation, Councilman was properly absent from his military base when the crimes with which he is charged were allegedly committed. There was no connection between Councilman's military duties and the crimes in question. The crimes were allegedly committed

not on a military post but in a civilian community. The alleged crime occurred in the State of Oklahoma in March of 1972 — certainly not an armed camp under military control. The alleged offense did not involve any question of the flouting of military authority nor the security of a military post, nor the integrity of military property.

The only possible distinction between the fact situation now presented to this Court and this Court's holding in the O'Callahan case, concerns the fact that the victim in O'Callahan was a member of the civilian community, while the alleged "victim" in this fact situation was an undercover CID Agent. This distinction will be more fully discussed later in the Brief, but it is submitted that the distinction, if any, does not make this fact situation sufficiently "service-connected" to deny Councilman his rights to a trial by jury in a civilian court as guaranteed by the Sixth Amendment.

The Supreme Court in Relford v. Commandant, U. S. Disc. Barracks, Ft. Leavenworth, 401 U. S. 355, 91 S. Ct. 649, 28 L. Ed. 2d 102 (1971), has enumerated twelve factors to be considered in deciding whether a particular crime by a serviceman is service connected. They are:

"1. The serviceman's proper absence from the base.

"2. The crime's commission away from the base.

"3. Its commission at a place not under military control.

"4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

"5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

"6. The absence of any connection between the defendant's military duties and the crime.

"7. The victim's not being engaged in the performance of any duty relating to the military.

"8. The presence and availability of a civilian court in which the case can be prosecuted.

"9. The absence of any flouting of military authority.

"10. The absence of any threat to a military post.

"11. The absence of any violation of military property.

"12. The offense's being among those traditionally prosecuted in civilian courts." 401 U. S. at 365, 91 S. Ct. at 655.

In the Relford case, the Supreme Court also enumerated the following interests which, if present, point strongly to service connection:

"(a) The essential and obvious interest of the military in the security of persons and of property on the military enclave. ***

"(b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. ***

"(c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.

"(d) The conviction that Article I, Sec.8, Clause 14, vesting in the Congress the power 'To make Rules for the Government and Regulations of the land and naval Forces,' means, in appropriate areas beyond the purely military offense,

more than mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term 'Regulation' itself implies, for those appropriate cases, the power to try and to punish.

"(e) The distinct possibility that civil courts, particularly non federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary problems within its own community. ***

"(f) The very positive implication in O'Callahan itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance.

"(g) The recognition in O'Callahan that, historically, a crime against the person of one associated with the post was subject even to the General Article. ***

"(h) The mis-reading and undue restriction of O'Callahan if it were interpreted as confining the Court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law. (and)

"(i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a service-defendant's on-duty and off-duty activities and hours on the post." 401 U. S. at 367-369, 91 S. Ct. at 656-657.

The application of the lettered interests to the present fact situation reveal only a tenuous argument for service connection. There is no basis for suggesting that the civilian Courts have any different criteria for the trial

and punishment of service men accused of the types of crime here alleged, than for civilians. There is also no basis for suggesting that the civilian Courts open here have less than an active interest in the types of offenses alleged. Further, the record reflects absolutely no use of Councilman's rank to influence the undercover CID Agent's actions here. At all times concerned, both Councilman and the CID Agent, Skaggs, in fact, behaved toward each other as one civilian man to another. There is to be sure, some "service connection" in virtually anything by a member of the Armed Forces does. Any crime committed by a member of the Armed Forces must have some "service connection" i.e. some effect on the Commanding Officer's duty and responsibility to maintain order and discipline in the ranks.

Let the issue not be clouded on this point, however. Not everything a service member does is sufficiently "service connected" to strip him of his constitutional rights and confer court-martial jurisdiction. The Fifth Amendment to the United States Constitution specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger" from the requirement of prosecution by indictment and from the right to trial by jury. If the offense is not sufficiently "service connected" to come under this exception, then the accused — serviceman or not — should be accorded his full constitutional rights for the reasons set out in the O'Callahan opinion, infra.

While it is difficult to say with certainty the degree of "service connection" present in applying the lettered interests of Relford, the numbered interests of Relford interpreting O'Callahan are easier to apply. Of the twelve factors enumerated in the Relford decision, Numbers 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 clearly point away from court-martial jurisdiction. Only on Point 7 can there be even an argument that court-martial jurisdiction is proper.

It is submitted that Point 7 should be considered only in crimes where there is a victim, such as murder, rape or theft. It is further submitted that there is no victim to the crime of possessing or selling marijuana. Even if it is conceded that there is a victim in the crime of sale and transfer of marijuana, a distinction should be made for victims "engaged in the performance of a duty relating to the military" and the alleged victim in this situation. In the present fact situation, Councilman was invited to a party by undercover Agents who introduced Councilman to the CID Agent, Skaggs. The alleged offenses here involve the CID Agent who was posing as a Specialist 4 in the Army. It is conceded that the CID Agent was in fact performing a duty on behalf of the military, but it is submitted that the informer was not the type of "military victim" which Point 7 of the above interests is intended to encompass.

There are several factors which support this argument and point away from court-martial jurisdiction in this case. First, although the CID Agent was in the military and was posing as a Specialist 4, he was never in uniform at the time the alleged offenses occurred. Second, the alleged offenses occurred off-base at a private apartment and during off-duty hours. Third, the CID Agent was also involved with the arrest of numerous other persons, both civilian and military.

This case bears a close factual relationship to United States v. Larry D. Morley, 20 USCMA 179, 43 CMR 19, in which it was held that a court-martial has no jurisdiction to try the accused on charges of selling marijuana and LSD where the offenses occurred off base in a civilian community in Kansas, and the purchaser was a civilian. In the Morley case, the informers were Federal Narcotics Agents. The Court held that the off-base sale of marijuana and LSD to a member of the civilian community, the Federal Narcotics Agent, was not a service-connected offense, and that the court-martial was

without jurisdiction to proceed. It is true that the informer here was a CID Agent and not a Federal Narcotics Agent, and that the CID Agent was posing as a member of the military. These factual distinctions should not cloud the main issue however. The main issue is whether the alleged offense is sufficiently "service-connected" to deprive this Defendant of his constitutional rights to a trial by a jury in a civilian court. We submit that this alleged offense is clearly not sufficiently service- connected to give jurisdiction to the military courts.

The present facts are also very similar to United States v. Daniel E. Mueller, CM 420337, in which a CID Agent posing as a Specialist 4 purchased marijuana from the Defendant at an apartment off base in Leavenworth, Kansas. In the Mueller case, the Defendant pleaded guilty, but the Court went on to reason that the appellant's offenses were service-connected. The Court attempted to distinguish O'Callahan on the grounds that the O'Callahan offenses directly involved a civilian victim while reasoning that there was no civilian victim in the Mueller case. The Court also reasoned that O'Callahan was not applicable because the CID Agent was in fact performing a duty on behalf of the military by participating in the transfer. Finally, the Court held that mere possession of marijuana imports service connection because it at least potentially involved the good order, discipline and reputation of the Armed Forces.

Even though the Military Court in the Mueller case cited the O'Callahan opinion, they clearly did not follow its mandate. The military should not be allowed to "manufacture" jurisdiction for themselves by having CID Agents pose as servicemen when the same offense if involving a civilian would clearly be outside military jurisdiction. This back-door approach to avoiding the import of the Supreme Court's decision in O'Callahan and Relford should not be allowed.

It is submitted that all twelve of the factors set out in O'Callahan and enumerated in Relford point away from military jurisdiction in this case. It is possible, however, that the O'Callahan and Relford cases will operate to deprive the military of jurisdiction even if one or more of the factors point toward military jurisdiction. In United States ex rel Flemings v. Chafee, 330 F. Supp. 193 (1971), the Petitioner was improperly absent from his military base at the time of the alleged offense, and the offense was committed during World War II. The Court said that Relford Points 2, 3, 4, 6, 7, 8, 9, 10, 11 and 12 clearly pointed away from court-martial jurisdiction, while Points 1 and 5 supported the finding of service connection. The Court went on to hold that neither of the two factors enumerated permitted a finding of "service connection."

Federal Courts have had occasion to decide at least two cases with close factual similarity to the case before this Court. In Moylan v. Laird, 305 F. Supp. 551 (1969), a member of the United States Marine Corps was granted an injunction by the District Court of Rhode Island, prohibiting military authorities from subjecting him to an unconstitutional court-martial for the off-base possession of marijuana within the peripheries of the civilian United States. In the Moylan case, the Petitioner was absent without leave at the time of the alleged offense and had on his person 42.5 ounces of marijuana, which may have indicated an intention to distribute. Since the Petitioner in Moylan was absent without leave at the time of the alleged offense at least one of the Relford points would support the finding of service connection. The Court, however, stated that there was no "service connection" in the off-base possession of marijuana. The Court reasoned:

> "No more so than the commission of other crimes does this particular crime (possession of marijuana) tend to undermine military authority."

and went on to hold:

> ". . . that off-base possession of marijuana within the peripheries of the civilian United States is not a matter over which the military jurisdiction extends."

The Fifth Circuit Court of Appeals has also been presented with a question bearing a close factual similarity to the question before this Court. In Cole v. Laird, 495 F. 2d 829 (1972), a serviceman was convicted by a court-martial for the unlawful use of marijuana. He petitioned the Federal Courts for injunctive relief on the ground that the court-martial was without jurisdiction to try him for the offense. The Fifth Circuit Court of Appeals held that since the Petitioner serviceman was off-post, off-duty and in civilian clothes at the time of the alleged offense, the constitutional requirement of "service connection" was not present and the military had no authority to try him by court-martial. The Court also pointed out that the Petitioner's use and possession of 5.9 grams of marijuana indicated only a casual connection with the drug. The Petitioner in the case before this Court now also involves exactly 5.9 grams of marijuana.

SUMMARY AND CONCLUSION

Under the present facts, the question presented to this Court is whether a court-martial has jurisdiction to try a member of the Armed Forces who is charged with a commission of a crime cognizable in a civilian court having as its only military significance, the involvement of an undercover CID Agent where the alleged offense was committed off-post, during off-duty hours and while out of uniform. If the Court finds sufficient "service connection" herein, the Defendant will be deprived of his Constitutional rights to indictment by Grand Jury and a trial by a jury of his peers in a Civilian Court.

We emphasize that the function of the military is the

defense of our nation. It is the function of our judicial system to try persons accused of crime.

To be sure, the military has need of a specially formed system of court-martial to administer and enforce authority within the military establishment. That specially formed system for the enforcement of military rules however, should not be extended beyond that for which it was intended.

The offenses here alleged are outside the scope of "service connection" as previously defined by this Court. The Judgment of the Court below should therefore be affirmed.

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